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FAR EASTERN SECTION

SOME ASPECTS OF TOKUGAWA LAW

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INTRODUCTION

THE FALL of China to communist forces has brought many otherwise complacent people to the realization that the enemies of democracy are outnumbering its friends in Asia. This is not a new phenomenon. Facts and frankness require us to recognize that neither in the past nor present has Western democracy demonstrated the capacity to take root and grow in Asia. But the fact that the present trend is not only undemocratic but actively directed against our nation has kindled a new desire to understand the reasons for the difficulties of democracy in the Far East.

Several explanations have been offered. Certain callow individuals have felt that democracy would flourish in Asia, if only the present "wicked" group of plotters could be eliminated. Others have more accurately perceived that in Asia the presuppositions of democracy—minimum standards of living, literacy, and an individualistic ideology—do not exist, and to remove one group of plotters would likely clear the decks for another, maybe worse. Appliances and light bulbs are useless until the house is wired for electricity; formal machinery of self-government and individual rights may, by their existence, help to induce the prerequisites for their proper use, but they may also be perverted or lie idle in a country of poverty, illiteracy, and a tradition of patriarchal authority.

Although the present article does not undertake to analyze important economic, educational, and population problems facing the Orient, it is suggested that the basic principles found in Tokugawa (1603-1868) jurisprudence are exercising a lingering influence in present-day Japan and furnish a substantial resistance to immediate enforcement of many of the legal reforms accomplished by the Allied Occupation in the last six years.

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The Allied Occupation of Japan has been a unique attempt to democratize quickly and by legislative fiat, and it has been faced by problems. The whole concept of force to make people free is a bit paradoxical, though perhaps not impossible. Personnel unschooled in the Orient have had to rely on models familiar to them, but not *ipso facto* suited to Japan. If the stigma of being labeled a foreign imposition[1] was to be avoided, the Japanese had to be consulted; consulting the Japanese led to frustrating persuasion, negotiation, and compromise. Hasty drafting was necessary because the Occupation would be of limited duration, and most important for our purpose here, much of the legislation was advanced in form far beyond the facts as found in actual Japanese society—hence a gap between the law in the books and the law in practice.

Just how the Japanese will deign to enforce and to what extent they are able to enforce the legal reforms of the Occupation are questions about which the people of the democratic world are anxiously speculating. Though Tokugawa principles have undergone changes and have lost much of their strength, it is suggested that they are not mere curiosities of the past, but have cast out historical strands which extend down to and affect present-day Japanese law and life. They are one element which must be reckoned with in any speculation on the future fate of Occupation legislation.

Historical Orientation

Until 1922 Japanese study of their own legal history was limited largely to treatments on specific periods, usually ancient,[2] and compilations of ancient laws.[3]

In 1922 Professor Nakada Kaoru presented a comprehensive series of lectures at Tokyo University, which were later published to become the first legal history of Japan, covering the whole period from the foundation of the nation to the Meiji Restoration.[4] Even in the most

[1] During the course of Japan's strenuous efforts to westernize since 1868, she has periodically experienced waves of reaction. "Sonno-joi," meaning "loyalty to the Emperor and expulsion of foreigners," is still a potential threat to all changes in Japan.

[2] For instance, Miyazaki Michisaburo, who was the first professor to hold the chair of comparative law at Tokyo University (1883), is said to be also the first Japanese scholar to make legal history his specialty, and he concentrated on the 968-1467 period. See Sansei Miyazaki Hoseishi Ronshu, edited by Nakada Kaoru (1929).

[3] Konakamura Kiyonori, Mihon Kodai Hoten (1892) (Collection of the Ancient Laws of Japan), which is a compilation of the written law of Japan from the Taiho Code (702) to the Meiji Restoration (1868).

[4] See Nakada Kaoru, Hoseishi Ronshu (3 vols.).

recent general texts,[5] however, the history of the Japanese legal system is not brought past the Restoration.[6] There are several monographs on the developments since Meiji,[7] and several volumes to cover the period have been projected but not yet completed.[8]

One of the most interesting aspects of Japanese legal history from the standpoint of comparative law is the fact that it has involved several receptions of foreign laws from widely different origins. The first was the adoption of Chinese laws and administrative practices in the seventh century. Then after more than a thousand years, the civil law of the European continent was superimposed upon, and to a large extent replaced, the Japanese law as it had developed up to 1868. Finally, though it is too early to determine the exact extent of the reception, since 1945 the Allied Occupation has resulted in formal adoption of many Anglo-American, common law principles, especially in the field of constitutional and criminal law.[9] Since the Tokugawa period stands in the middle of this development, a brief account of the previous and subsequent history is necessary for a proper perspective.

Unfortunately, most of the early history of Japanese law is concerned with legislation because it is recorded; whereas the whole bulk of private law was largely customary and unrecorded, and therefore historical evidence of it is scarce.[10]

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[5] See ISHII RYOTSUKE, NIHON HOSEISHI GAISETSU (Outline of Japanese Legal History) (1948). This is a fine book by a former student of Professor Nakada. See also TAKIGAWA MASAJIRO, NIHON HOSEISHI (Japanese Legal History) (1928), the first text on Japanese legal history. It is written in simple Japanese and is excellent for beginning students; see also 1 TAKAYANAGI SHINZO, NIHON HOSEISHI (Japanese Legal History) (1949) and 1, 2 MIURA SHUKO, HOSEISHI-NO KENKYU (A Study in Legal History) (1943, 1944). Professor Miura was a professor of literature at Kyoto University.

[6] See Ishii Ryotsuke, NIHON HOSEISHI-YO. This Outline of Japanese Legal History, designed for teaching legal history, has a chapter on post-Meiji developments at pp. 239-294.

[7] See DR. HANS RUETE, DER EINFLUSS DES ABENBLAENDISCHEN RECHTS AUF DIE RECHTSGESTALUNG IM JAPAN UND CHINA (1940); KIYOURA-KEIGO, MEIJI HOSEISHI; and Takayanagi Kenzo, *Reception and Influence of Occidental Legal Ideas in Japan* (one of a series of essays entitled WESTERN INFLUENCES IN MODERN JAPAN, Chicago, 1931).

[8] For instance, Takayanagi Shinzo has one volume published, another expected, which deal with the Restoration.

[9] See Appleton, *Reforms in Japanese Criminal Procedure under Allied Occupation*, 24 WASH. L. REV. 401 (1949); Meyers, *Revision of the Criminal Code of Japan During the Occupation*, 25 WASH. L. REV. 104 (1950).

[10] The Japanese Department of Justice made a study of the customary law of Tokugawa Japan at the time the new codes were being drafted. Also John Henry Wigmore has made some of this law available in English in his Materials for the Study of Private Law in Old Japan. 20 TRANSACTIONS OF THE ASIATIC SOCIETY OF JAPAN (TASJ) Supplement 1 (1892). He projected ten volumes, but besides the Introduction only two (Persons, Part VII, and Contracts, Part II) were published. His manuscripts are at the main office of the Kokusai Bunka Shinkokai in Tokyo.

There is considerable variation in the periods into which Japanese scholars divide Japanese legal development, but by and large the major dividing points are in accordance with the Chinese (702), European (1868), and Anglo-American (1945) receptions. However, the period from 702 to 1868 requires further breakdown, and Professor Takigawa Masajiro divides it into two periods: first, the period of Chinese reception from the Taiho Code (702) to the beginning of the Kamakura period (1185); second, the period of harmonization of these Chinese importations with indigenous law (1186-1868). This latter period (1186-1868) is also the period of Japanese feudalism and is further divided into three periods: The Shikimoku period including the Kamakura and Muromachi regimes (1185-1467); Kokuho period when law was decentralized and provided by local lords for their own domains (1467-1603); and the Tokugawa period of centralized codified law (1603-1868).[11] All of these are basically feudal, though the character of Kamakura feudalism was different from Tokugawa feudalism.

Chinese Period (Yugohojidai)

The period before the reception of the Chinese system was dominated by the national patriarchal state. During this time the government was largely preoccupied with religious duties and the ritual of ancestor worship; the law was largely indigenous and unaffected by foreign influence; it was unwritten; the main authority was in the family or clan (shizoku); land was privately held; and official positions as well as trades were hereditary.

In the terms of formal law, the Chinese period begins with the Taiho Code of 702[12] and ends with the Joei Shikimoku (1232) of the Hojo dynasty at Kamakura, which also marks the beginning of basically feudal law.[13]

In the 6th century Buddhism was introduced into Japan and in the 7th century the wholesale importation of the Chinese legal system of the T'ang (618-907) dynasty was accomplished. This system repre-

[11] TAKIGAWA MASAJIRO, NIHON HOSEISHI, 45-61 (1928). Cf. ISHII RYOTSUKE, NIHON HOSEISHI, 4-8 (1948). Here the divisions are 702-967; 968-1467; 1468-1858; 1858-present. From the standpoint of actual development Professor Ishii's division may be preferred.

[12] The Taiho Code in its original form is not extant, but its general content may be found in the revision of 718 known as the Yoro Code. The law of this period was called "Ritsuryo." The new term "Shikimoku" was applied to the first feudal laws (Joei) 1232. For the gist of the Yoro Administration, see G. B. Sansom, *Early Japanese Law and Administration,* 9 TASJ (2d Series) 69 (1932).

[13] Note that ISHII, *op. cit., supra,* note 11, at 5, places the end of the Chinese period at 967 A.D. when the system of public land and central control began to weaken.

sented the zenith of Chinese law, and it is generally held that the changes in Japan, known as the Taika Reforms were excessive.

As in the Chinese system all positions in the society were filled on the basis of merit, and hereditary offices and occupations were abolished. There was a high degree of centralization with power in the Emperor's government. All the land was nationalized and allotted to the farmers equally for use during their life without power to sell or lease for more than one year. A system of conscription required one-third of all able-bodied men to enlist at twenty, and a rice tax plus a labor tax to transport the tax rice to the capital were instituted.[14]

The history of the Taika Reforms from 967 until about 1200 was a process of deterioration and a movement back to private ownership and hereditary rights. With the decline of the military strength of the Imperial Government, continuous warring between various sectional lords helped in the development of the feudal system in order to provide security lost in the process of decentralization.

The Japanese Feudal Period

As mentioned above, the Japanese feudal period divides itself into three phases: first, the feudal development of the "Sho"[15] in the Kamakura and Muromachi period; second, a period of warring lords; third, the centralized feudalism of the Tokugawas. During the course of the civil wars of the first phase of feudalism (in the Hojo and Ashikaga periods), lack of central powers to guarantee security in the society brought about the typical feudal arrangement whereby the landowners committed their land to a war lord, holding it under him on a pledge of fealty and military support in exchange for protection. This personal, private relationship was a bar to alienation of land, though it could be inherited and subinfeudated.

No sooner had feudalization been completed, however, than centralization leading up to the Tokugawa Shogunate began to undermine the feudal order. Perhaps more than anything else, the independence of the peasants brought about feudal decay. Because the shiki of the Japanese peasant was always more flexible and alienable than the peasant's interest in European feudalism, he never became quite as dependent as his European counterpart. The fact that the relationship of the cultivator is more intimate in rice culture may have been one of

[14] For a detailed and scholarly treatment in English of the effect of Chinese reforms on early Japan, see K. Asakawa, THE EARLY INSTITUTIONAL LIFE OF JAPAN.

[15] The "sho" was a manor originally established to open new land to cultivation.

the causes for the maintenance of relative independence. Also the removal of the warrior from the land and giving him a rice stipend to be drawn from the lord's granary would tend to make the cultivators more independent.[16]

The first written feudal laws of Japan are the Hojo Institutes of Judicature[17] (Go Seibai Shikimoku or Joei Shikimoku) of 1232. Since the later codes of Ashikaga and Tokugawa are largely republications with subsequent accruals to date, it may be regarded as the taproot of all Japanese written feudal law. It contained fifty-one articles of general hortative character intended as moral guides to feudal magistrates, and was not intended to supersede the customary private law.[18]

The next significant feudal legislation is the Ashikaga Code (Kemmu Shikimoku), 1336. When Ashikaga Takauji overthrew the Hojo Shogunate at Kamakura, he issued the Kemmu Shikimoku to supplement the Hojo Code, not to displace it. This code is the last of the important written antecedents of Tokugawa law.[19]

The written law of Tokugawa Japan is to be found in four main sources: first, the code for the Imperial Court Nobles (Kuge Hoshiki, 1615);[20] second, the codes for the ruling warrior classes (Buke Shohatto, 1615, amended and republished in 1635, 1663, 1683, etc.)[21] and the Shoshi Hatto[22] (1632) for lesser warriors; third, the laws for commoners (Kosatsu, starting from 1711),[23] were prohibitions and instructions posted in the public places in Edo for the observance of the common people; last, the Edicts of 100 Articles (O-Sadame-Gaki Hyakkajo, 1742)[24] were a compilation of rules for guidance of the officials on criminal matters issued by Tokugawa Yoshimune at about the middle of the Tokugawa Era.

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[16] K. Asakawa, *Some Aspects of Japanese Feudal Institutions*, 46 TASJ (Part I) 78 (1918). The author analyses the development of Japanese feudalism and indicates wherein it differed from European feudalism.

[17] See UEKI, GO SEIBAI SHIKIMOKU NO KENKYU (a Study on the Institutes of Judicature).

[18] John Carey Hall, *Japanese Feudal Law: The Institutes of Judicature*, 34 TASJ 1 (1906) gives a translation in English and a brief analysis; KONAKAMURA KIYONORI, NIHON KODAI HOTEN 399-426 gives the Japanese text.

[19] Hall, Japanese Feudal Laws, Part II: The Ashikaga Code, 36 TASJ (Part II) 1 (1908) for English text; KONAKAMURA, *op. cit., supra*, note 18, at 643, for Japanese.

[20] Hall, *Japanese Feudal Laws, Part III: The Tokugawa Legislation*, 38 TASJ 272-285 (1912). For various English texts; KONAKAMURA, *op. cit., supra*, note 18 at 763, for Japanese.

[21] Hall, *supra*, at 288; KONAKAMURA, *op. cit., supra*, note 18, at 767.

[22] Hall, *supra*, at 309; KONAKAMURA, *op. cit., supra*, note 18, at 795.

[23] Hall, *supra*, at 320; KONAKAMURA, *op. cit., supra*, note 18, at 801.

[24] Hall, *Japanese Feudal Laws, Part III: The Tokugawa Legislation, Part IV*, 41 TASJ (Part V) 1; KONAKAMURA, *op. cit., supra*, note 18, at 843.

Besides the legislation above enumerated which was primarily public law, there was a vast morass of customary law which governed all of the private law relationships between commoners. Also the law applicable in the provinces of the various lords was local law of their own making.

Japanese Law Since Meiji

The main development in Japanese law between the Meiji Restoration and World War II was the reception of the codified law of the European continent and its ultimate symbiosis with the law of the past that had culminated in Tokugawa times and remained in the minds and practice of the people of Japan.

Needless to say, a project the scope of which covered the drafting and adoption of a new constitution as well as new civil, criminal, commercial, and procedural codes could never have been accomplished unless there had been strong pressures both from within and outside Japan. Internal pressures were great, and they were caused by fundamental commercial and social developments which had reached the point where the old Tokugawa laws and machinery geared for a static, isolated, and feudal society were inadequate. This trend was not only present after the restoration, but had its genesis long before Perry and, in fact, gave birth to the forces which produced the restoration.[25]

External pressure for codification along Western lines came from the fact that the Japanese were humiliated by the extraterritoriality which the Western countries required from Japan. There was little chance for the abolition of extraterritoriality without a change in the legal system to make it more acceptable to Western standards of justice.

After intensive study in Europe, Prince Ito Hirobumi, who had developed a great admiration for Bismarck, returned to Japan and piloted the new Meiji Constitution into operation in 1889. It was largely modeled after the Prussian constitution, with the Emperor, not the people, declared sovereign, individual rights limited by law, the cabinet largely independent of the Diet, and various organs of privilege and power, such as the Privy Council and the military independent of the Cabinet. It was from these features in the constitution that much of the traditional authoritarianism was later able to perpetuate itself.

The story of the drafting and enactment of the private law codes of Japan is a fascinating one but beyond the scope of this article.

[25] See E. HERBERT NORMAN, JAPAN'S EMERGENCE AS A MODERN STATE (1940).

Suffice it to say, that the French jurist, Boissanade, was one of the central figures in the drafting of the criminal and civil codes which were consequently heavily influenced by French law, though the general structure is akin to the German.

The work of Dr. Hermann Roesler, a German jurist, on the commercial code, influenced it strongly along German lines.[26]

Post World War II

After the war ended in 1945, a new constitution, establishing a parliamentary government somewhat similar to England's but also incorporating features of the United States Constitution, was adopted in Japan. Its provisions for individual liberties and equality of the sexes has necessitated an extensive modification of the codes, especially the laws of inheritance, marriage, divorce, and crime.[27]

Basic Precepts and Characteristics of Tokugawa Law

A. Men are Unequal

The application of a principle such as our provision that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws"[28] would have had a drastic effect in Tokugawa Japan. The whole society was stratified with classes within classes which would have been unreasonable by our standards. The fundamental principle upon which this class structure rested was that men are naturally unequal, by birth, and from that principle it followed that in all phases of life they should be treated unequally.

The social hierarchy began with the Emperor at the apex as the theocratic patriarch of the state. Next comes the Shogun, who in form was only the Emperor's generalissimo, the preserver of the peace and leader in war. In fact, he wielded the actual power of the central government.

Under the Emperor and Shogun, the rest of the population may be grouped into seven classes. First is the Kuge, the Imperial Count Nobles, who had once been administrators during the Chinese period, but who had lost power when the Shogunate was established by force of arms. The Kuge were largely significant as intriguers during the

[26] Takayanagi Kenzo, *Reception and Influence of Occidental Legal Ideas in Japan*, to be found in a series of monographs entitled, Western Influences in Modern Japan (1929).

[27] See Blakemore, *Post-War Developments in Japanese Law*, 1947 Wis. L. Rev. 632; Oppler, *The Reform of Japan's Legal and Judicial System Under the Allied Occupation*, 24 Wash. L. Rev. 290 (1949) for general surveys of these reforms.

[28] U. S. Const. Amend. XIV, § 1.

Tokugawa period. The second class were the Buke, the military nobility or war lords. This group ruled Japan during the epoch and contained several classes within it. On lines of size of their fiefs the Buke were divided into Daimyo (over 10,000 koku of rice)[29] and Samurai (under 10,000).

The Samurai (the lesser Buke) were divided into two classes—the Seishi and Kashi. The Seishi had powers of punishment over the Kashi; they had larger rice stipends (but under 10,000 koku) and could ride horses. The Shogun's Seishi were called Hatamoto and were influential in Tokugawa government positions.

The third, fourth, and fifth classes of Tokugawa society were the three orders of commoners, hyakusho (farmers), the shokunin (artisans), and the shonin (merchants), in that order of rank. The merchants were at the end of the scale and were considered little better than the eta (outcasts, usually tanners or undertakers) and hinin (beggars). These latter constituted the last two of the seven classes.[30]

Where society is as clearly stratified as Tokugawa Japan, it naturally follows that these strata must be observed in law, that the relation between strata must be defined, and that the competence and jurisdiction of one toward the other must be observed, not only in the substance of the law but in its procedures and organs. The Edo government, through legislation, concerned itself primarily with defining and confining the power of the Buke as to their interrelations and, to a limited extent, toward commoners—a crude sort of constitutional law.

As for the vast majority of some thirty million people of the period,[31] they were governed among themselves by customs of long standing. Whereas, vis-à-vis the central government, they were largely subject to the discretion of the Buke against those whose will the system afforded meager protection indeed.

The hereditary strata illustrate how drastic the inequalities of the Shogun's law might be, but one must read the materials on protocol and procedure to get a full appreciation of the stultifying persuasiveness and refinement of the inequality institutionalized by Tokugawa

[29] A koku was about five bushels and the standard unit of value. One koku was in general adequate to sustain one commoner for one year. The warrior's income was measured in terms of the number of koku his fief produced, or the number he was entitled to draw from his superior's granary.

[30] See ISHII, *op. cit., supra,* note 11, at 381-391.

[31] It is interesting to note that Dr. Kaemfer, a physician with the Dutch at Deshima, estimated that Edo was the largest city in the world during the eighteenth century in his HISTORY OF THE JAPANESE EMPIRE.

law. The Kuge-Hoshiki, one of the major laws, contains many sections concerned with the following type of trivia:

As regards the colors of robes: for those of the fourth rank and upwards, the color is to be tsuru-bami (tea color); for those of the fifth rank, vermilion over an undercoat of red; for those of the sixth rank, deep green, etc.[32]

Besides official, military, and occupational differentiations and inequalities, the inferior position of women in the Tokugawa system is noteworthy. The fundamental basis for their treatment is to be found in the Chinese doctrine of the perpetual obedience of woman to the other sex. It is expressed in the precept of the "three obediences": "Obedience, while yet unmarried to a father; obedience, when married, to a husband; obedience, when widowed, to a son."[33]

Although the first deity of Japan, Amaterasu Omikami, was a woman (during the pre-Chinese period of Japanese law women were free from artificial man-made inferiority), the philosophy of Buddhism, which regarded women as unclean creatures of temptation, and feudalism, which shunned anything effeminate, combined to render the Tokugawa women a rather underprivileged class of near slaves or toys.[34] For example, the law of adultery in the O-Sadame-gaki Hyakkajo does not conceive the possibility of a wife having a grievance against an unfaithful husband. However, the fate of the adulteress is very much at the disposal of the husband:

If the husband kills only the adulterer and the wife escapes alive, she is (when caught) to be decapitated.

If however, the adulterer escapes, the husband is free to do as he likes with the wife.[35]

The further degradation of women is shown by Section 46:

Suits regarding the sending out by the lower class people into service of adopted daughters as women of pleasure are not to be entertained by the courts, even when brought by the true parents.[36]

Also in the family as the basic unit of society were embodied a vari-

[32] English Text: Hall, *Tokugawa Legislation*, 38 TASJ 279.

[33] HOZUMI NOBUSHIGE, THE NEW JAPANESE CIVIL CODE AS MATERIAL FOR THE STUDY OF COMPARATIVE JURISPRUDENCE 62 (1912). On p. 63 Hozumi quotes Prof. Chamberlain as follows: "Japanese feudalism despite its general similarity to the feudalism of the West—knew nothing of gallantry. A Japanese knight performed his valiant deeds for no such fanciful reward as a lady's smile."

[34] See HOZUMI SHIGETO, ENKIRIJO TO ENKIRIDERA.

[35] Hall, *Tokugawa Legislation*, 41 TASJ 741.

[36] *Ibid.*, 739.

ety of inequalities: the eldest soon succeeded to the head of the house and the property; men outranked women; age prevailed over youth.[37]

Further examples of inequality would serve no purpose. Suffice it to say that one of the most fundamental principles at the very core of Tokugawa society was the principle of privilege, heredity position, wealth, titles, services, classes, each with a carefully defined protocol which permeated the whole society.

B. Military over Civilian

Although the position of the Buke over the commoner was one of the basic hereditary inequalities dealt with above, the domination of the government by the military is a principle significant in and of itself. That the consequences were substantial is well illustrated by the following provision from the Legacy of Ieyasu, Chapter XLV:

> The samurai are the masters of the four classes. Agriculturists, artisans and merchants may not behave in a rude manner towards samurai. The term for a rude man is "other than expected fellow," and a samurai is not to be interfered with in cutting down a fellow who has behaved to him in a manner other than is expected.[38]

This rule popularly known as "kirisute gomen" or "permission to cut down and leave [without further ado]" was interpreted more strictly as the time went on, but it shows clearly how the Tokugawa powers viewed the position of the soldier in the state. In the O-Sadamegaki Hyakkajo (criminal code) provisions were made for the corpses of culprits to be used by the samurai as a "chopping block," a welcome opportunity to try a new blade.[39]

The law applied the theory that the farmers and townsmen were not only inferior but existed for the military class. There were different laws of marriage,[40] one for the Buke, one for the commoner. The same offense was described as a "crime" if committed by a commoner, an "excess" if by a samurai. An official code of Tokugawa announced the unequal protection of the laws as follows: "All offenses are to be punished in accordance with social status." Samurai were ordered to commit suicide; commoners were executed.

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[37] Often the penalty for killing or assaulting a father or elder brother was more severe than for the same crime for an inferior. See Hall, 41 TASJ (Part V, Sec. 71) 766. See Howard Meyers, *op. cit., supra,* note 9, at 25-6, for provisions still remaining in the criminal law favoring family elders.

[38] JAMES MURDOCH, 3 HISTORY OF JAPAN 802.

[39] "After lopping off the head, the corpse is to be thrown away as a "tameshi-mono" (i.e., chopping block for any two-sworded man to try his blade on . . ."), Hall, 41 TASJ 792-793, Part V.

[40] Hall, 38 TASJ 306, sec. 14 (Buke Shohatto, as promulgated in 1710).

The contempt with which samurai regarded business and businessmen is shown by the following passage of the Shoshi Hatto (Law for the Lesser Gentry) of 1630:

> No samurai, whether in high or in low position, is to engage in trade or to lay in a stock of goods with a view to making profit out of them. His purchases must be restricted to the amount required by his position.[41]

In court the dispensation of justice was purely a matter of grace bestowed by the military, and Wigmore makes the point as follows:

> I have been told that one of the reasons why the mercantile classes resorted so little to the courts in their disputes was the necessity of humiliating themselves so deeply in their quest for justice—of crawling, for instance, on hands and knees from the door of the court to the judgment room.[42]

C. Federalism

The Shogun's government has been described as possessing a sphere of influence of maximum intensity at the center, gradually diminishing until at the outer edge it became almost nothing. This power arrangement was a type of federalism, which, coupled with the class system, gave the central government more or less power over an individual, depending first upon his social status and second on his location.

On the geographic basis the division of power was between the Shogun's own territory where the lords (Fudai) owed direct fealty and the Kokushi or Tozama areas where only a tenuous subordination was recognized because the Shogun was the deputy of the Emperor.

The Fudai area was totally dependent on the Shogun's authority and directly governed by Edo. The fiefs of these lords could be taken at will or changed; the Shogun's official organs closely supervised the collection of taxes and the administration of justice.

As for the Kokushi and Tozama, two Western authorities seem to disagree as to the degree of independence enjoyed. John Henry Wigmore calls the Shogun only a *primus inter pares*[43] among the lords, especially with relation to such distant potentates as Shimazu of Satsuma (Kyuchu) and Date of Denwa (Sendai area). James Murdoch suggests that actually the independence of the Tozama was very limited and that Wigmore's statement is likely to mislead, because on occasion the Shogun deposed Kokushi and Tozama, changed their fiefs and in general dominated them.[44]

[41] Hall, *op. cit.*, sec. 20, p. 315.
[42] Wigmore, *Materials for the Study of Private Law in Old Japan*, 20 TASJ 74, Part I (1893).
[43] WIGMORE, *op. cit.*, at 28.
[44] JAMES MURDOCH, *op. cit., supra*, note 37, at 17-18.

Actually the relationship of the Tozama and the Shogun was vague and based more on power than law even though all Buke were nominally under the Shogun in law. That the preponderance of power was clearly with the Shogun is clear from the figures on rice production under his control, since rice was the measure of value and power. In 1664 the total Japanese production was about twenty-eight million koku, and seventeen million were controlled by the Shogun, either from his personal domain or for the Fudai, Gosanke, or Hatamoto. Also he controlled all of the main roads and cities.[45] It seems clear that the power within the Shogun's control influenced the Tozama considerably.

From a constitutional point of view, several principles of organizations which were present in the Tokugawa Shogun's system are very clever and interesting. In the first place, it was a policy to have all of the important positions filled by at least two men, one to check the other for mistakes or misfeasance. In the past, the dynasty of Sparta and the dual consuls of Rome as well as the present use of bicameral legislatures are interesting parallels.

Secondly, the leaders of the magistracies were always appointed by and directly responsible to the Roju, Senior Council; whereas, the heads of the bureaus within the magistracies were appointed by and responsible to the Waka-doshiyori or Junior Council. Again, this was a technique of government to prevent collusion and nepotism by having two sets of responsibilities incorporated into each administrative organ—one to the appointing power, one to the administrative superior.

Thirdly, the Tokugawa government made good use of the Ometsuke or censors. They checked on the conduct of the Daimyo not only while in Edo but in their own baliwicks. Metsuke performed the same function for the Hatamoto. This division of function corresponded to the division between the Roju and Waka-doshiyori; the O-metsuke and the Metsuke were a kind of intelligence agency for the Roju and Waka-doshiyori respectively.[46]

Fourthly, the Shogun took great care to block all access to the potentially powerful and dangerous Emperor by requiring that all audiences with him be cleared through the Shogun's agent at Kyoto, the Shoshidai.

Fifthly, the Shogun required that all of the Daimyo spend alternate periods in Edo and their fiefs, and while at the fiefs they were required

[45] MURDOCH, *op. cit.*, at 24.

[46] MURDOCH, *op. cit.*, at 8, note 1, for a detailed list of the official machinery of the Tokugawa government defined functionally and listed in order of official rank for protocol purposes.

to leave their families as hostages in Edo. This practice was called Sankin Kotai.

In general, these principles insured a compact, efficient, and relatively incorruptible government, capable of self-propulsion for long periods during which the Shoguns themselves, as personalities, were of little weight in government. The central government from the standpoint of law and justice was important mostly because it governed the governing class (Buke), and its fiat was constitutional law for the provinces. Of course, it was also largely preoccupied with the personal vanities, privileges, ceremony, comfort, and luxury of the little core of its domain, the castle. This is a characteristic myopia of feudal systems apparently.

D. Conciliation Was Preferred Over Litigation

The settlement of disputes in the Shogun's domain was a two-stage process, beginning with attempts at conciliation conducted by the popular organization in the villages. If not resolved there, the formal machinery of the Shogun's central government was invoked to decide the issue.

The government of the people in the villages was based on the family as the basic unit with the family head exercising broad power over persons as well as property. Next was the kumi, composed of five contiguous families headed by a nan-gashira, whose seal was required to authorize various transactions.[47] Some large villages had several kumis grouped under a kumi-gashira. Then the whole village was under the headman or nanushi.

The first half of the process of administering justice, the conciliatory half, took place in this popular organization. Over a cup of tea the family head, nan-gashira or headman, mediated between the disputants in an attempt to adjust their differences peacefully and informally. Most quarrels were concluded at this level, but if the headman failed and conciliation proved impossible, then the official organs of the Shogun's government were invoked.

The lowest court was that of the daikan, the local representative of the Shogun, who entertained suits of first instance brought by the headman on behalf of his villager. If the daikan failed, the court of appeals was the Finance Magistry (Kanjo Bugyo), one of three important departments of the central government to which cases could

[47] For example, see WIGMORE, LAW AND JUSTICE IN TOKUGAWA, JAPAN, Part II (Contracts), published by Kokusai Bunka Shinkokai (1941), p. 13, for descriptions of sales legalized by the nan-gashira.

be referred.[48] The court of last resort was the Hyojosho, which heard only exceptional cases on appeal.[49]

Though the process of administration of justice was composed of two steps, popular and official, actually cases did not go to the daikan until exhaustive efforts were made to conciliate through the headman.[50] Just why there was such a strong inclination to avoid litigation[51] may be explained in different ways. Wigmore offers the following reason for this prevalence of compromise in old Japan based on the unique character of the Japanese to prefer smoothness in human relations.

> Perhaps even more powerful and deep rooted in the character of the people was the tendency to conciliation. . . . Not to attempt too much refinement of analysis, it may perhaps be laid down that a chief quality of that character is not so much a predominance of the emotional nature as the comparative weakness of the will. . . . The fierce determination to do, which Anglo-Saxons know so well, is wanting. The leisurely way of carrying out an undertaking, the lack of power . . . to "toil terribly," the shrinking from physical violence—these seem to point back to the quality I named.[52]

Fully realizing the futility of most arguments over the relative importance of inherent and environmental factors in character, it might be mentioned that the argument quoted may as likely state the result as explain the system. It may be a tribute to the efficiency of Shogunal repression that the people were so docile and conciliatory, rather than evidence that they were naturally not litigious, and, therefore, sought amicable processes for solution of disputes.

Perhaps the reason for this conciliatory tendency was a result of feudal principles. Dispensing justice was regarded as a matter of grace from the lord to the commoner, and a good commoner was expected not to disturb the lord or waste his own time litigating. Thus a case must have real merit before a commoner would have the courage to impose upon his governor for justice. Penalties which attached to the offence of reasserting claims once decided or bringing charges that were unfounded made it almost necessary to predetermine a case before

[48] The Jisha and Machi Bugyo heard cases from the temples or town jurisdictions respectively.

[49] The Hyojosho had a kind of original jurisdiction over disputes involving people or property from different Kokushi's fiefs.

[50] See Buke Shohatto of 1683, sec. 7, Hall, 38 TASJ 300, and sec. 9 of 1710, p. 304; also Shoshi Hatto, *supra*, at 314, for laws requiring use of this conciliation procedure.

[51] See Hall, 41 TASJ 732-4, Part V for sec. 33 of the O-Sadame-gaki Hyakkajo denying a judicial remedy to joint venturers and cosignatories and requiring them to conciliate.

[52] WIGMORE, *op. cit., supra*, note 41; 20 TASJ (Supp.) 75.

trying it in court or taking a chance at the peril of being banished if one lost.[53]

In old English law the king discouraged maintenance and champerty, prosecution of doubtful causes of action by professional litigants. However, this English practice seems much milder than the Tokugawa laws, which consequently caused such a heavy emphasis on conciliation. At any rate this inclination to decide cases out of court was an important principle of Tokugawa law, which also is evident today, for in Japan there seems to be little of the sporting attitude toward litigation found in Anglo-American legal history.

E. Individualization of Law

One scarcely has to read more than a few sections of Tokugawa legislation to perceive that it is flexible enough to allow a judge to make whatever personalization is necessary on a given set of facts to equate the adjudicated result with the moral requirement. For example, two sections from the Regulations for Peasants under Iemitsu in 1642:

> Should there be any worthless farmers who don't cultivate their land properly, and so fail to pay their tax, they shall be deprived of their holdings.
>
> Should any farmer be single-handed or in difficulties, then the rest of the village shall come to his assistance and help him with his tillage so that he may be able to pay his taxes.[54]

It seems quite clear that neither of those provisions are even worthy of the name "law" in the strict sense. No amount of exegetical analysis of such a text could yield a precise and indisputable answer to a given set of facts. Rather, they are merely grants of blanket authority to the daikan to do what the situation seems to require—as he sees it.[55]

Such an administrative process is not unlike some of our own modern delegations of authority to the independent regulatory agencies to make rules. They are always controlled by a standard,[56] but it is so vague that merely as a matter of words it does not control. The control in the United States rather comes from ultimate responsibility to Con-

[53] See Hall, 41 TASJ 697, Part V, sec. 5 of the O-Sadame-gaki Hyakkajo: "A person who for persistently petitioning through the plaint box, has been handcuffed and who after having been forgiven again puts his plaint into the box is to be expelled from Edo whether he be a resident in the city or in the suburbs."

[54] A. L. SADLER, THE MAKER OF MODERN JAPAN, Appendix I (1937); see also sec. 100, O-Sadame-gaki Hyakkajo, TASJ XLI, Part V, p. 790 for similar standards in criminal cases.

[55] See below: Rule of Man, etc.

[56] See Communications Act of 1934, 47 U.S.C.A. 309(a): "If upon examination of any application for a station license or for the renewal or modification of a station license the commission shall determine that the *public interest, convenience, and necessity would be served by the granting thereof,* it shall authorize the issuance...."

gress and the protection for the people comes from procedural requirements in their favor, judicial review, and official good will.

Certainly, given an omniscient and benign daikan, the "law" of Tokugawa was flexible enough to make justice personal and equivalent to moral standards, a result sometimes not possible under strict adjudication by a rule of law. The history of equity in Anglo-American law has been an attempt to mitigate the rigors of our rules of law and introduce a personalizing factor into our legal system akin to that which thoroughly dominated Tokugawa law.

F. A Rule of Man Instead of a Rule of Law

One need not be very astute to recognize the other side of the problem discussed above. A large part of Anglo-American legal history has been a story of attempts to protect the individual subject of the law from the will and caprice of officials. It is held to be a *sine qua non* of popular control of government that the official be confined in his competence to that which his master, the people, command. No better way has seemed possible than to make that command take the form of law in and of itself precise enough to admit of a minimum of discretion in applying it.

Specific cases of the rigors and injustices which arise from an overly assiduous dedication to this principle are unfortunately numerous, and the counter-movement of equity and the modern trend of searching for the so-called "spirit" of the law are attempts to lubricate unbending rules in order to avoid excesses. All in all, it may be that injustice is more likely to be present in a system of thinly veiled discretion and commands for specific cases than would arise from a slavish application of rules of law especially where elections are not available or effective to check official discretion.

Our philosophy of government requires that popular sovereignty be a corollary of the rule of law. Furthermore, because we hold that certain things cannot be done to individuals or minorities even by a majority government, we have superior rules of law and a constitution to limit the scope of the power of the policy formulating officials as well as the administrative officials. Otherwise, a rule of law would serve only to impose the will of an autocrat or a tyrannous majority without any guarantee that this will would be any more acceptable to the majority or protective of minority rights than the judge's will. It should be noted however, that certainty in the law is important in order that those subject to it can predict the legal consequences of their actions.

For this reason a rule of law would be preferable to a rule of men even in a system without constitutional rights or popular sovereignty.

Two things can be mentioned which might assuage the hardships possible under a legal order such as Tokugawa Japan. In the first place, a discretionary and personalized judicial process will be compensated for in direct proportion to the virtue, wisdom, and sense of responsibility which the ruler possesses. Whether or not the daikan or daimyo was such a man, it would be difficult to determine. However, there is ample evidence that the Japanese were thoroughly aware of the importance of this factor. Nearly all of the legislation directed toward the Buke in this period contained provisions exhorting the potentates to strive to get good and wise men in office.

> The lords of the great domains [Kokushu, lit. masters of the great provinces] must select men of capacity for office.
>
> The way to govern a country is to get hold of the proper men. The merits and demerits [of retainers] should be closely scanned, and reward and reproof unflinchingly distributed accordingly. If there be capable men in administration, that domain is sure to flourish; if these be not capable men, then the domain is sure to go to ruin. This is an admonition which the wise ones of antiquity all agree in giving forth.[57]

It might be pointed out in passing that John Stuart Mill's insistence that the idea that a virtuous, wise, benevolent dictator is the best form of government is a dangerous trap seems quite convincing.[58] If the end of society is the total development of the individual, it probably cannot come entirely from above. Of course, in Tokugawa Japan, the end was not the individual.

Secondly, in a simple society such as the Tokugawa village where the relationships are more intimate and personal, the social pressure to avoid conscious injustice will perhaps be strong enough to help offset the possibility of arbitrariness presented by the system.[59]

G. Ethics and Law Are Synonymous

It was not until the modern prewar period that the principle of "Saisei Itchi" (unity of religion and government) reached its ultimate

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[57] See thirteenth article of the original Buke Shohatto by Hidetada (1615): Hall, 38 TASJ 291-2; also Ernest W. Clement, *Instructions of a Mito Prince to His Retainers,* 26 TASJ 115.

[58] John Stuart Mill, *That the Ideally Best Form of Government Is Representative Government,* CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1875), ch. 3.

[59] The problem of developing a rule of law in Japan in Meiji times is discussed in Wainwright, *Japan's Transition from the Rule of Man to the Rule of Law,* 48 TASJ 155 (1919).

form of a nation-wide cult of patriotism.[60] However, foundations for the theocratic nationalism, which Japan developed just before World War II, were laid solidly in the history of Japan, and the doctrines espoused by the military during the war were the result of a process of the synthesis of old indigenous Shinto doctrine with the Japanese perversions of Confucianism.

One of the most noticeable aspects of Tokugawa legislation is that it usually takes the form of guides to moral administration rather than precise unbending rules purporting to be exact measures of specific behavior. If action is ethical and moral, it is legal; the law is *ipso facto* ethical and moral.

This problem is interrelated with the two previous topics of individualization and rule of law. In part at least, a system with a rule of law is based on a rather niggardly appraisal of officials as self-regulated moral beings. In a system with a rule of men, naturally one of the chief concerns is to cultivate wisdom and virtue in public officials; if they are wise and virtuous, a rule of law is superfluous.[61]

Various sections of the Tokugawa codes exhort lords to seek virtuous officers, and even advert to the tendency to serve private ends by public office, but the only safeguard evoked is good conscience and observance of Confucian concepts of propriety of status.[62]

There is one more important aspect of old Japanese law which should be mentioned in regard to the "Saisei Itchi" principle. In Japan the law was not merely ethical, it was also religious. In pre-Chinese times the chief *raison d'etre* for government was to perform religious rites. The Emperor was God as well as ruler. Government was called Matsurigoto on affairs of worship. In Tokugawa times while the Shogun ruled in the name of the Emperor, at Edo, the Emperor busied himself at Kyoto with Shinto and Buddhist affairs, among other things. If God rules, the law cannot be wrong.[63]

A more homely but perhaps more important influence of religion on law in Tokugawa times was the practice of ancestor worship and its consequences on the family regulations.

[60] D. C. HOLTOM, MODERN JAPAN AND SHINTO NATIONALISM (1941).

[61] See note 58 *supra*.

[62] Hall, 38 TASJ 303; Buke Shohatto of 1710, sec. 6: "All officials, great or small, or others in posts of command, must be careful not to abuse their authority to the detriment of the people, or prostitute their public position to the purposes of private advantage. . . ."

[63] Note that Christianity (also all heretic sects) was banned. See Buke Shohatto (1635), Hall, 38 TASJ 297, sec. 19; and Edo Kosatsu of 1711, *Ibid.*, p. 326. It is important to realize in this regard that the Japanese concept of divinity is substantially different than the Christian.

The effect of ancestor worship on the national administration, as such, was probably not as strong as it became just before 1945 when all rescripts, decrees, and even the constitution were prefaced by references of respect to Divine Imperial Ancestors. As for family affairs of commoners, on the other hand, the legal effects of ancestor worship in Tokugawa Japan were numerous and profound. Matters of registration, marriage, succession, and adoption were all controlled by the Temple Magistracy (Jisha Bugyo), and rules governing those very important matters were such as were calculated to perpetuate the line of descent and provide progeny to worship the family's ancestors. Hence, the prevalence of adoption is explained by a desire to prevent extinction of the line.[64]

It is in this field that the Tokugawa influences have persisted with the most strength down to our times, and it was in an attempt to root out this vestigial influence in the modern family law that the Legal Section of SCAP spent considerable time and effort.[65]

H. The Group, Not the Individual, Is the Basic Unit of Society

The most basic unit of Tokugawa society for legal purposes was the family, although it included members whom we do not usually think of as members of a family. The usual members were: the head of the house or father, wife, eldest son and wife, all younger sons unmarried and unadopted by other families, and all unmarried or divorced daughters. There might be a retired father or mother and others. No limit was legally placed on the househead over either the property or the persons of the family except the requirement of responsible beneficence defined by Confucian ethics. Rights against authority were almost nonexistent in the family; it was a matter of grace from male to female, from elder to younger. On the other hand, the father was responsible for the public as well as private duties of all members in law.

This principle of vicarious responsibility was carried to a remarkable degree on up the scale of authority in Tokugawa local governmental units. On reaching the headman of a village who, as will be remembered, marks the end in popular control and who deals with the

[64] See HOZUMI NOBUSHIGE, ANCESTOR WORSHIP AND JAPANESE LAW (1912) for an analysis of the remaining influences of ancestor worship in Japan after the adoption of the continental codes.

[65] Kurt Steiner, *The Revision of the Civil Code of Japan: Provisions Affecting the Family*, FAR EASTERN QUARTERLY, pp. 169-184 (Feb., 1950); Wagatsuma Sakae, *Democratization of the Family Relation*, 25 WASH. L. REV. 405 for a survey of the reforms in practice.

daikan as agent of the people, we find that in the O-Sadame-gaki Hyakkajo (criminal code) he was often punished for crimes of his villagers, and sometimes a fine was assessable against the whole village for acts of a member.[66]

As a general characteristic, this is one of the most striking—that in the whole system of criminal and civil law the individual has no legal existence as such or except as he is a part of a group, family, kumi, village or class.

I. Emphasis on Duty, Not Right

As a corollary of the importance of the group and also the "rule of men," the Tokugawa law was concerned almost exclusively with definition of duties to master and group.[67]

The Confucian basis of official morality is worthy of closer scrutiny at this point, for it was a morality of status and groups, and from our point of view to assume that hereditary status and consequent inequality based thereon could be the foundation of justice is to beg the question.

In general, Confucian relationships required a duty of loyalty from the inferior (subject, son, wife, younger brother, etc.). However, the Japanese perversion of Confucius lies in that the inferior has no recourse to resistance in case the *quid pro quo* is not forthcoming from his "benevolent superior."

Probably it would be too strong to say that the experience of Tokugawa Japan showed an unqualified disposition on the part of the ruling class to exploit the commoner, as was clearly their ethico-legal duty to refrain from doing, but clearly their power to do.

For Confucius the paramount virtue was filial piety whereas Japanese militarism emphasized a single aspect of the concept and raised the duty of loyalty toward a master to the apex of the scale of morality and soft-pedaled the beneficence owed by the master. Originally, loyalty was a military virtue, but it later came to govern the relation between merchant and clerk, artisan and apprentice, and even between gambler and pupil—every known relationship in Japanese society.

[66] O-Sadame-gaki Hyakkajo, sec. 21: "The village in which any of the above offenses are perpetrated are to be heavily fined." 41 TASJ 708, part V. See Military Government of the Ryukyus Islands, Special Proclamation No. 32, Codified Penal Law and Procedure, June, 1949: sec. 1. 3. 5. 6 for use of this principle of vicarious liability by the U.S. occupation.

[67] HOZUMI, THE NEW JAPANESE CIVIL CODE AS MATERIAL FOR THE STUDY OF COMPARATIVE JURISPRUDENCE, p. 57, notes that this emphasis on duty was so strong that there was not even a word for "right" in the Japanese language until 1868, when Dr. M. Tsuda coined the word "Kenri" in his book, A TREATISE ON WESTERN PUBLIC LAW.

J. The Law Was Secret

The O-Sadame-gaki Hyakkajo (Code of a Hundred Articles), which was a compilation of the criminal laws of the realm of Yoshimune in 1742, concludes with the following:

> The foregoing having been duly reported [to the Shogun], it is hereby decreed. It is not to be allowed to be seen by any one except the magistrates.

In all modern legal systems the principle, *Ignorantia non excusat* (ignorance of the law is no excuse for violation), is fundamental to enforcement. This is true largely because if ignorance of the law did excuse, every attempt at enforcement would entail delving into the mind of the accused to prove or disprove actual ignorance. But as a matter of fairness, the necessity of full publicity and formal promulgation to the subjects has been considered a requisite corollary. In Japan, as elsewhere, it would appear that a criminal could be convicted without regard to his pleas of ignorance, but the difference lay in the fact that he was denied access to the law.

As pointed out by Sansom,[68] however, this is more a matter of appearance than actually the case. In the first place the law was only a matter of "right relations" in many cases, and the moral tenets of the society were simple (loyalty) and well known. Secondly, the prohibitions were posted; it was merely the guides to discretion of judges regarding punishment which were secret. And, furthermore, in a law as flexible as old Japan's no one could know the law as to his case. It would be a problem in psychoanalysis of the judge.

K. Private Law and Public Law Are Coalesced

In a purely feudal society the position of private contract becomes of dominating importance. Nearly all of the functions ordinarily thought of as governmental are provided for by private contract. In fact, the most basic of all public functions, namely, that of providing security from force and violence, is a personal obligation of the lord in exchange for which his vassals pledge on an oath of fealty to render service to him. The contractual relationship extends from the top to bottom of the society in a hierarchal arrangement with a king, emperor, or Shogun on the top. The possibility of such an arrangement is dependent upon several preconditions such as a predominantly agricultural society and a breakdown of central government requiring that security be otherwise provided.

[68] SANSOM, JAPAN, A SHORT CULTURAL HISTORY, 460.

It must be remembered, however, that Japanese feudalism began to break down under the impact of commercial development in Tokugawa times.[69] Furthermore, the central government became strong enough to exercise an over-all security and governing function for most of the area of Japan, a condition which became somewhat inconsistent with the theory that public security is a matter of private arrangement. The bulk of the legislation which accumulated throughout the Tokugawa period tended to build up practices and set precedents of general force and applicability and to develop a public law to govern the lords.

L. The Private Law of the People Was Customary

Custom is a standard of action which has been long observed and acted on by the people, and custom is properly regarded as a source of law. However, the difficult question to determine is when does custom become customary law. Receiving the force of state recognition is the gist of the distinction, but when does the recognition take place?

Of course, a custom may be enacted, but then it is written and not customary law. Then, too, purely customary law may be written by other means than sovereign enactment and still remain customary. Customs also may be reduced to writing without conferring the force of law upon them, witness the "Sachsenspiegel" of Germany.

The problem of accommodating customs within the framework of state cognizance is one of importance in all legal orders and especially in proportion to the lack of written law, which in turn may be an indicium of the progress of the state along our scale of civilization. Tokugawa private law may be classified as almost entirely customary.

Property and contract relationship between commoners as well as their family and personal relations were regulated by customs and customary law of little concern to the Shogunal government. In fact, most of the disputes that arose concerning marriage, divorce, succession, etc. between commoners were not only governed by their own customary law but, by far the most of them, were settled by their own organs, "out of court" so far as Tokugawa officials were concerned. A comparative analysis of the content of their customary law is beyond our scope here, though it differed most substantially from ours in the fields of family law and personal relations in general—ours being based on the individual's importance and freedom, theirs on the group and status.

[69] Though the public law-private law distinction may be subject to serious logical criticism, it seems useful for purposes of making this analysis. See HANS KELSEN, THE GENERAL THEORY OF LAW AND STATE, p. 201 (1945).

M. The Criminal Law Was Repressive and Deterrent

The criminal law as codified for the realm by Yoshimune in 1742 (O-Sadame-gaki Hyakkajo) was harsh. Commoners were subject to the death penalty for pilfering, scandal, and other relatively minor offenses. The death penalty was so common that it seems that the degree of seriousness of the crime was not defined in terms of *whether,* but *how* the offender was to be killed. The refinements attained in the art of execution and torture are described *ad nauseam* in C. J. Hall's treatment of this subject.[70] One is led to wonder if there was any limit to human cruelty. However, the answer to the question is found in the Legacy of Ieyasu, where it is forbidden to tie one leg of a man to one ox and one leg to another ox and let them loose to free themselves one way or another. This was considered an impropriety. It was proper, however, if one killed a superior to place the offender in a public place to be sawed in two by a bamboo saw placed so that the passing public could take a stroke on him if the inclination struck them.

A person could only be punished for a crime upon conviction, which was in turn only possible on presentment of a signed confession. In order to procure this confession, a progressively severe torture technique in four stages was devised to get the required evidence for conviction. All four stages were masterpieces of ingenuity and even the first was severe enough so that few lasted for the second treatment.[71]

It must in all fairness be added that such harsh criminal law is apparently a characteristic of feudal society and that these Japanese laws are not substantially different either in kind or degree from those of feudal Europe.

Conclusions

The principles enumerated above were fundamental to the operation of one of the most unique societies of modern history. By 1945 some of these principles had weakened (customary law); others had strengthened (Saisei Itchi); still others had disappeared (public security by private contract).

While time and changed conditions have had their effect upon these Tokugawa precepts since 1868, it is still true that they have a lingering influence. If the movement toward popular self-government which

[70] Hall, 41 TASJ 1, part V, and for an account of the way these laws were improved in 1870, J. H. Langford, *A Summary of the Japanese Penal Codes,* 5 TASJ (1877).

[71] Langford, *op. cit.,* at 791 *et seq.*

Japan has made and will make in the future seems to be at a modest rate, an understanding of Japan's starting point at the Meiji Restoration may furnish part of the answer.